

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TRAVIS WAYNE TOLLEY,
Plaintiff

v.

ALAN W. BUZZARD, BEN CALDWELL,
and GREG GARDNER,
Defendants.

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CASE NO. 7:19-cv-00863

PLAINTIFF'S CORRECTED MEMORANDUM IN IN SUPPORT OF MOTION
TO FILE FOURTH AMENDED COMPLAINT

BACKGROUND

Plaintiff Travis Wayne Tolley offers this corrected memorandum¹ in support of his Motion for Leave to file a Fourth Amended Complaint (the proposed Fourth Amended Complaint is attached to the Motion for Leave to file a Fourth Amended Complaint as **EXHIBIT A**).

LEGAL STANDARD

A party may move at any time to amend its Complaint by leave of the court, and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court has declared that "this mandate is to be heeded," explaining that: [i]n the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave

¹ Counsel for Plaintiff drafted and filed the original motion and memorandum on February 5, 2021, however the software used for rendering the PDF file did not function properly and the resulting PDF documents for this and other documents counsel filed in another case on February 5th were truncated. This document has been printed and scanned directly to PDF for filing and so it is not searchable.

sought should, as the rules require, be 'freely given.' *Foman v. Davis* 371 U.S. 178, 182 (1962) (reversing denial of motion to vacate judgment and allow amendment of Complaint)

ARGUMENT AND AUTHORITIES

The timing of this Motion does not constitute any undue delay or burden upon the Defendants. The Complaint has been amended in the proposed Fourth Amended Complaint to (i) remove many factual allegations related to events that were alleged to have occurred on June 21, 2018², (ii) add important facts related to search of the Plaintiff's home on September 6, 2018 and (iii) clarify the nature of the Plaintiff's unlawful detention claims. No new counts or claims are raised.

The Fourth Circuit has interpreted the "liberal rule" of 15(a) to "provide that 'leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.' " *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (reversing denial of motion to amend) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (same)).

As the proposed Fourth Amended Complaint does not raise any new counts or claims, it is clearly not prejudicial to any of the defendants. Furthermore, the Plaintiff has not acted in bad faith; the proposed Fourth Amended Complaint seeks only to clarify and correct errors that resulted in part from difficulties related to the circumstances of his incarceration that the impact those circumstances had upon his ability to communicate with counsel. There has been no dilatory conduct; indeed, neither counsel for Plaintiff nor counsel for the defendants have

² The Third Amended Complaint related these events as having occurred on June 21, 2018, but after consultation with Mr. Tolley in response to the Defendant's pleadings, Mr. Tolley realized that the actual date of the events was June 16, 2018. However, this error is irrelevant as the Fourth Amended Complaint omits these events entirely.

submitted any discovery requests or subpoenas and the proposed Fourth Amended Complaint will not increase the scope or cost of discovery. Finally, the proposed Fourth Amended Complaint is not futile as it both removes chaff and adds wheat to the factual allegations that can only serve to clarify and narrow the issues in the case.

CONCLUSION

For all of the foregoing reasons, Plaintiff prays that this Court grant him leave to file the proposed Fourth Amended Complaint.

Respectfully submitted,

TRAVIS WAYNE TOLLEY
By Counsel

By: /s/ M. Paul Valois
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2021, I electronically filed the foregoing Memorandum with the Clerk of this Court using the CM/ECF system, which will automatically send notice of this filing to all counsel of record.

/s/ M. Paul Valois